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8 DRIVERS ED DIRECT, LLC  
9

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 TRAFFICSCHOOL.COM, INC., a  
13 California corporation; DRIVERS ED  
14 DIRECT, LLC, a California limited  
liability company,

15 Plaintiffs,

16 v.

17 EDRIVER, INC., ONLINE GURU,  
18 INC., FIND MY SPECIALIST, INC.,  
and SERIOUSNET, INC., California  
19 corporations; RAVI K. LAHOTI, RAJ  
LAHOTI, individuals,

20 Defendants.  
21

CASE NO. CV 06-7561 PA (CWx)

The Honorable Percy Anderson

DECLARATION OF MINA I.  
HAMILTON IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
ATTORNEY'S FEES AND COSTS

Hearing:

Date: December 5, 2011

Time: 1:30 p.m.

Courtroom No. 15

22 *[Filed concurrently with Notice of*  
23 *Motion; Memorandum of Points and*  
24 *Authorities; Joint Statement on*  
25 *Attorney's Fees; Joint Statement on*  
26 *Costs; Defendants' Comments to Joint*  
27 *Statement; Declaration of Josephine*  
28 *Brosas in support of Motion;*  
*Declaration of Andrew Serwin; and*  
*[Proposed] Order]*

**DECLARATION OF MINA I. HAMILTON**

I, Mina I. Hamilton, being duly sworn, state as follows:

1. I am over 18 years of age, have personal knowledge of the matters asserted in this declaration, can attest to their accuracy, and am competent to testify as follows:

2. I am an attorney at law admitted to practice before this Court. My firm Lewis Brisbois Bisgaard & Smith LLP ("LBBS") represents Plaintiffs TrafficSchool.com, Inc. and Drivers Ed Direct, LLC in this action.

3. This declaration is based upon my personal knowledge of the timekeeping and billing practices in this case and is also based upon my knowledge of the motions and briefs filed in this case.

Plaintiffs' Compliance with this Court's August 24, 2011 Order (D.E. # 302) ("Order")

4. On September 6, 2011, as required by this Court's Order, Plaintiffs' counsel provided the following documents to Defendants' counsel by email:

(a) copies of the billing records on which the motion will be based;

(b) copies of the American Intellectual Property Law Association ("AIPLA") surveys for 2008 and of The National Law Journal's 2010 Billing Survey Report for the hourly rates that will be claimed in Plaintiffs' motion;

(c) draft of the *Joint Statement for Fees* in Microsoft Excel 2002 format containing: (i) the date of each time entry; (ii) the biller for each time entry; (iii) a brief description of the task; (iv) the number of hours Plaintiffs believe should be awarded for the task, including information regarding the hours for which compensation will and will not be sought (such as write-offs); (v) the actual rates charged for each time entry; (vi) total amount billed for each time entry; (vii) a blank column for the number of hours Defendants believe should be awarded for the item; (viii) blank columns for a summary of the parties' respective positions as to each disputed item; (ix) codes for each time entry (i.e., "B" for billed and "W" for written off); and (x) for each time entry, an "invoice number" which

1 corresponds to the invoice number of the billing records submitted with the  
2 spreadsheets;

3 (d) draft of the *Joint Statement for Fees* in Microsoft Excel 2002 format  
4 containing: (i) the item; (ii) the amount of costs sought by Plaintiffs for the item;  
5 (iii) a blank column for the amount of costs Defendants believe should be  
6 awarded for the item; (iv) blank columns for a summary of the parties'  
7 respective positions as to each disputed item; and

8 (e) copies of invoices and other records showing the costs and expenses  
9 incurred by Plaintiffs.

10 Attached hereto as Exhibit A is a true and correct copy of my September 6, 2011 email  
11 to Defendants' counsel, Mr. Andrew Serwin, attaching the above-referenced  
12 documents.

13 5. On September 12, 2011, counsel for the parties met and conferred  
14 telephonically on the issue of Plaintiffs' attorneys' fees and costs. I and my associate,  
15 Josephine Brosas, attended the telephonic conference on behalf of Plaintiffs and Mr.  
16 Serwin and his associate Ms. Tammy Boggs attended on behalf of Defendants. I have  
17 reviewed the declaration submitted by Mr. Serwin in support of Defendants'  
18 "Comments" to the Joint Statement. His account of what took place at the meet and  
19 confer is inaccurate. (Indeed, it is telling that the substance of the meet and confer is not  
20 set forth in his declaration; rather, he makes a general reference to the "summary"  
21 provided in the "Comments" to the Joint Statement.) I explained to Defendants'  
22 counsel that Plaintiffs are claiming fees and costs as identified in the spreadsheets and  
23 in the billing invoices previously provided to them, and Plaintiffs are the prevailing  
24 party in an exceptional case, a position which is supported by the Ninth Circuit's  
25 opinion and Mandate. I also pointed out that the substance of the motion will be similar  
26 in large part to what was filed by Plaintiffs on August 25, 2011 before the Ninth Circuit  
27 in connection with the appellate fees. I recall asking Mr. Serwin to identify what  
28 entries Defendants are disputing in the spreadsheets and submissions sent to them on

1 September 6<sup>th</sup> and he informed me that such will be provided at a later time, when  
 2 Defendants are required to provide their portion of the joint statement. I recall Mr.  
 3 Serwin acknowledging that the spreadsheets provided were fairly self-explanatory. I  
 4 also recall Mr. Serwin stating vaguely, in general terms (and not as outlined on p. 3 of  
 5 Defendants' "Comments" to the Joint Statement), that Plaintiffs are not entitled to fees  
 6 because they are not the prevailing party in an exceptional case and that there has been  
 7 no allocation. As to costs, I explained that under well-established law, Plaintiffs are  
 8 entitled to claim costs, including expert fees and expenses not previously taxed by the  
 9 Clerk. Finally, as to information relating to fee arrangements with Plaintiffs in this case  
 10 and in other similar litigation handled by my firm, I informed Mr. Serwin that, as to the  
 11 former, I do not believe we have one but will inquire and follow up, and as to the latter,  
 12 Mr. Serwin volunteered that a list of the types of cases (e.g., patent infringement,  
 13 trademark infringement, false advertising) and the rates charged in those cases, will  
 14 suffice. Mr. Serwin also stated that other details, such as client names and case  
 15 information, are privileged, and that he does not expect to be provided with such  
 16 information. Mr. Serwin never mentioned anything about wanting to know which  
 17 attorneys worked on which cases, or any information other than a list of the case type  
 18 and corresponding rates. Mr. Serwin never asked to be provided with any "business  
 19 records showing hourly rates charged in other types of litigation" as he claims on p. 3  
 20 of Defendants' "Comments" to the Joint Statement.

21 6. On September 19, 2011, Plaintiffs' counsel provided Defendants' counsel  
 22 with the "final version" of their portion of the Joint Statements in electronic format as  
 23 required by the Court's Order. Plaintiffs' counsel also provided the list of rates in other  
 24 cases, as Mr. Serwin agreed to during our September 12<sup>th</sup> conference call. We were  
 25 also able to confirm that, as mentioned during the call, there exists no fee agreement  
 26 with Plaintiffs in this case as we have been unable to locate any such agreement.  
 27 Attached hereto as Exhibit B is a true and correct copy the email sent to Defendants'  
 28 counsel on September 19, 2011.

1           7. On September 19, 2011, Mr. Serwin responded to the above email,  
 2 confirming that he did not expect case names and that at minimum, he just wanted to  
 3 know “which attorney worked on these cases”. This is inconsistent with his claim on p.  
 4 3 of Defendants’ “Comments” that he asked for “business records showing hourly rates  
 5 charged in other types of litigation”).

6           8. In my email response to Mr. Serwin’s query, I stated that “we can  
 7 represent that those cases are cases led by David Makous or Dan DeCarlo with  
 8 assistance from me, Josephine and/or additional partners and associates.” I also asked  
 9 him to tell me what he thinks we agreed to exactly and what else he wants. Mr. Serwin  
 10 never responded to any of these queries. Attached hereto as Exhibit C is a true and  
 11 correct copy of the email exchange between Mr. Serwin and I.

12           9. On September 26, 2011, I received an email from Ms. Boggs attaching  
 13 Defendants’ “completed portions” of the Excel Spreadsheets on Plaintiffs’ attorney’s  
 14 fees and costs. Ms. Boggs also attached Defendants’ “Comments” to the Joint  
 15 Statement and a Declaration of Andrew Serwin. Attached hereto as Exhibit D is a true  
 16 and correct copy of Ms. Boggs’ email.

17 Billing Practices and Invoices

18           10. I and the other professionals working on this case record our time  
 19 contemporaneously in increments of one-tenth of an hour. These time records are  
 20 entered into a computer database that is maintained by LBBS’s accounting and billing  
 21 department in the ordinary course of business and used to create monthly “pre-bills”  
 22 and final bills to the clients. The billing partner in this case, Mr. David Makous,  
 23 reviews the pre-bills and uses his professional judgment to “write-off” any hours that  
 24 will not be billed to the client for various reasons, including if they appear to be  
 25 excessive or redundant. Here, my review of the billing reports of the time written-off  
 26 by Mr. Makous from November 2006 through February 2009 shows that at least 191  
 27 hours of collective attorney time were subtracted, so that the actual hours billed to the  
 28

1 Plaintiffs were *less* than the total number of hours actually worked by Plaintiffs’  
2 attorneys during this time period.

3 11. The client is then billed monthly for our time, with the fee determined by  
4 multiplying the hours recorded by the hourly rate of the professional. The client is also  
5 billed monthly for incidental expenses (called “disbursements”) such as filing fees,  
6 court reporters fees, photocopy costs, long distance bills, delivery charges, etc. Invoices  
7 were prepared monthly to reflect the time and disbursements expended for the prior  
8 month. The billing department printed out copies of the invoices billed to the client in  
9 this case.

10 Submissions Pursuant to the Court’s Order

11 12. Attached hereto as Exhibit E are true and correct copies of the invoices  
12 containing detailed attorney time records from November 2006 through February 2009.  
13 These invoices have been redacted to protect attorney-client privileged and work  
14 product information.

15 13. I have reviewed the invoices generated in this matter. Under my direction,  
16 my associate Josephine A. Brosas also reviewed these invoices and summarized  
17 relevant entries into an Excel spreadsheet format containing the hours which Plaintiffs  
18 are claiming in this Motion. Pursuant to the Court’s August 24, 2011 Order, attached to  
19 the Motion is a true and correct copy of that Excel spreadsheet with Defendants’  
20 portions (“Joint Statement on Attorneys’ Fees”). Included in that Joint Statement are  
21 tables for work performed in connection with the instant Motion and with the Joint  
22 Status Report previously filed with this Court (D.E. #306). It is estimated that  
23 Plaintiffs’ counsel will spend approximately 210 hours in connection with the instant  
24 Motion (including a reasonable and good faith estimate for the reply and any hearing).  
25 It is also estimated based on pre-bill time entries that Plaintiffs’ attorneys have spent  
26 approximately 115 hours in connection with the Joint Status Report (D.E. #306), not  
27 including additional time which will be spent on remand. Plaintiffs expressly reserve  
28 the right to submit at a later time further papers, declaration(s) and supplemental



1 evidence including invoices detailing the additional fees and costs that Plaintiffs are  
2 claiming for work on remand.

3 14. I have also reviewed the various invoices for costs and expenses generated  
4 in this matter which support the costs and expenses being sought by Plaintiffs in this  
5 Motion. Attached hereto as Exhibit F are true and correct copies of these invoices.

6 15. Under my direction, my associate Josephine A. Brosas also reviewed these  
7 invoices and summarized relevant entries into an Excel spreadsheet format containing  
8 the cost items which Plaintiffs are claiming. Pursuant to the Court's August 24, 2011  
9 Order, attached to the Motion is a true and correct copy of that Excel spreadsheet with  
10 Defendants' portions ("Joint Statement on Costs").

11 16. Attached hereto as Exhibit G is a true and correct copy of excerpts from  
12 reports based on surveys periodically conducted and prepared by the American  
13 Intellectual Property Law Association ("AIPLA Survey") and published every other  
14 year to determine the billing rates in intellectual property cases. As can be seen from  
15 the report itself, by 2008 in the Los Angeles area, the average hourly billing rate for  
16 partners was \$503 and the average hourly billing rate for associates in the Los Angeles  
17 area was \$349.

18 17. Attached hereto as Exhibit H is a true and correct copy of The National  
19 Law Journal's 2010 Billing Survey Report. The rates charged to Plaintiffs in this case  
20 are well below most of those charged by the nation's 250 largest law firms, including  
21 defense counsel at Foley & Lardner, who reportedly charge an average rate of \$654 an  
22 hour for partners, and \$426 an hour for associates. It is also reported that at Sheppard  
23 Mullin Richter and Hampton (former defense counsel who handled the district court  
24 proceedings), partners bill at a high-end firm wide rate of \$820 and associates at a firm  
25 wide high-end rate of \$620 (average rates were not reported).

26 Summary of Hours and Fees Claimed

27 18. The approximately 2,679.7 hours of attorney time spent in proceedings  
28 before the district court was actually incurred, necessary and reasonable in order to

1 complete the multiple and varied tasks related to the following general categories: (1)  
 2 pleadings and amendments thereto, including successfully opposing Defendants'  
 3 motions to dismiss (about 241.20 hours); (2) fact and expert discovery, including  
 4 written discovery, depositions, preparation of expert initial and rebuttal reports,  
 5 surveys, and motions to compel (about 773.30 hours); (3) cross-motions for summary  
 6 judgment; (4) pre-trial submissions, including witness lists, exhibit lists, jury  
 7 instructions, memorandum of contentions of fact and law, motions *in limine*, and  
 8 additional specific filings dictated by this Court's order (trial declarations, deposition  
 9 designation, stipulation regarding trial exhibits (about 463.10 hours); (5) bench trial and  
 10 Court-ordered post-trial filings, such as post-trial briefs and findings of fact and  
 11 conclusions of law, and Defendants' motion to stay the injunction (about 590.90 hours);  
 12 (6) and Plaintiffs' contempt motion (about 143.70 hours). In addition, at least 115  
 13 hours have been incurred in connection with the Joint Status Report (D.E. # 306) (not  
 14 including additional fees to be incurred on remand) and there are at least 210 hours that  
 15 Plaintiffs anticipate have been and will be incurred in connection with this instant  
 16 Motion, which is allowed as part of the claimed fees.

17       19. The total attorney's fees charged applying the actual rates is \$809,850.  
 18 The fees being sought herein is \$2,867,616. This amount reflects the lodestar figure of  
 19 \$1,433,808, adjusted upward with a 2.0 multiplier. The \$1,433,808 lodestar figure was  
 20 calculated by multiplying the number of hours reasonably expended on proceedings  
 21 before the district court prior to or excluding the appellate proceedings (i.e., 2,679.7),  
 22 including this Motion (i.e., 210 [incorporating time estimated for the Reply and any  
 23 hearing]) and the preparation of the Joint Status Report (D.E. #306) (i.e., 115) by the  
 24 reasonable hourly rates (i.e., \$503 for partners and \$349 for associates). These are  
 25 summarized in Tables 2 through 4 attached to the Motion.

26       20. Trafficschool.com has been a long-standing client of the firm. David N.  
 27 Makous, Dan DeCarlo and I have represented Trafficschool.com on multiple matters  
 28 since 1999.



1 Summary of Attorney Experience and Qualifications

2 21. LBBS has a full service intellectual property practice group providing  
 3 patent, trademark, copyright, false advertising, unfair competition, and related law  
 4 services to the business community, both locally and overseas. The attorneys who have  
 5 worked and/or are working on this case (not necessarily at the same times) are: (1)  
 6 David N. Makous (partner); (2) Daniel C. DeCarlo (partner); (3) Mina I. Hamilton  
 7 (partner); (4) Josephine A. Brosas (associate); (5) Robert M. Collins (associate); and (6)  
 8 Daniel R. Lewis (associate). Attached hereto as Exhibit I are true and correct copies of  
 9 the aforementioned attorneys' website resumes.

10 22. I am an attorney licensed to practice in the State of California since 1999.  
 11 I have practiced law since graduating from UCLA School of Law in 1999 and have  
 12 over ten (10) years of trial and litigation experience, with emphasis on intellectual  
 13 property issues, particularly under the Lanham Act including false advertising, and  
 14 complex commercial litigation. I have been a partner with LBBS for over three and a  
 15 half years. I became a partner during the course of this litigation and was a partner  
 16 during the work performed on the appeal; however, my associate hourly rate was not  
 17 adjusted.

18 23. Mr. David N. Makous, lead counsel in this case, has practiced intellectual  
 19 property law since 1978 and is managing partner of the firm's intellectual property  
 20 practice group and has significant and extensive experience with Lanham Act and false  
 21 advertising cases. He has managed numerous IP cases before federal and state courts in  
 22 many jurisdictions through preliminary injunction hearings, summary judgment  
 23 motions, bench and jury trials, mediation, arbitration and other ultimate dispositions.  
 24 He has also argued appeals before the U.S. Courts of Appeal for the Ninth, Eighth,  
 25 Fifth, and Federal Circuits, and the California Court of Appeals. He is a frequent  
 26 speaker and lecturer, and has numerous published articles. He argued the appeal in this  
 27 case.

28

24. Mr. Daniel C. DeCarlo has practiced intellectual property and complex litigation since 1992 and is the vice-chair of the firm's intellectual property practice group. He has served as lead counsel in numerous jury and bench trials and has extensive experience in all aspects of Federal Court litigation including preliminary injunctions, summary judgments and appeals to the Ninth Circuit and Federal Circuit Courts of Appeal. He has significant and extensive experience with Lanham Act and false advertising cases. He frequently lectures to business groups on intellectual property issues and also has numerous published articles.

25. The associates who worked on this case have practiced and specialized in intellectual property law, since becoming members of the bar, and have at least three (3) to six (6) years of trial and litigation experience on Lanham Act cases.

#### Various Iterations of the DMV.ORG Splash Screen

26. Attached hereto as Exhibit J is a true and correct copy of a print out of the DMV.ORG splash screen as it appeared on or about March 23, 2009. As can be seen in this print out, there are two drop down menus on the screen. These drop down menus appeared while the page was loading and then disappeared once the page fully loaded in the web browser.

27. Attached hereto as Exhibit K is a true and correct copy of a screen shot of the DMV.ORG splash screen as it appeared on or about August 25, 2009.

28. Attached hereto as Exhibit L is a true and correct copy of a screen shot of the DMV.ORG splash screen as it appeared on or about August 26, 2009.

29. Attached hereto as Exhibit M is a true and correct copy of a screen shot of the DMV.ORG splash screen as it appeared on or about July 28, 2011. Defendants have removed "Unofficial Guide to the DMV" from their license plate logo. Additionally, there was a delay of approximately two to three seconds before the disclaimer text (in faint grey font) appeared right below the browser toolbar.

30. Attached hereto as Exhibit N is a true and correct copy of a screen shot of the DMV.ORG splash screen as it appeared on or about November 1, 2011. Again,

1 there was a delay of approximately two to three seconds before the disclaimer text (in  
2 faint grey font) appeared right below the browser toolbar.

3  
4 DMV.ORG's "Website Support" Page Directing Consumers to "DMV Office" "Online  
5 Services"

6 31. Attached hereto as Exhibit O are true and correct copies of screen shots  
7 which I obtained on or about September 20, 2011 from Defendants' DMV.org website  
8 and Facebook "wall".

9  
10 New Visitors to DMV.org

11 32. According to a 2003 DMV study, there are approximately 20,000 new  
12 provisional licenses issues monthly. This includes all drivers under the age of 18. See,  
13 [http://dmv.ca.gov/about/profile/rd/r\\_d\\_report/Section%201/205-GDL%20Report.pdf](http://dmv.ca.gov/about/profile/rd/r_d_report/Section%201/205-GDL%20Report.pdf)

14 33. According to the US DOT, FHA (United States Department of  
15 Transportation, Federal Highway Administration) report for 2009, there were 236,358  
16 licensed drivers aged 16 & 17 in CA. The average age according to the CA DMV  
17 study noted above for a provisional license being issued is 16 ½. The same report  
18 showed there were 3,836,929 licensed drivers aged <16, 16, 17 in the entire United  
19 States. See, <http://www.fhwa.dot.gov/policyinformation/statistics/2009/dl22.cfm>.

20  
21 Online Guru Article re Facebook "Likes"

22 34. Attached hereto as Exhibit P is a true and correct copy of an article dated  
23 July 9, 2011 entitled "DMV.ORG Surpasses 50K 'Likes' on Facebook" which I printed  
24 from [www.onlineguru.com](http://www.onlineguru.com) on November 3, 2011.

25  
26 I declare under the penalty of perjury that the foregoing is true and correct.

27 Executed at Los Angeles, California, on the 3<sup>rd</sup> day of November, 2011.

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/s/ Mina I. Hamilton

Mina I. Hamilton